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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 369

AMERICAN FARM LINES, *Appellant*

v.

BLACK BALL FREIGHT SERVICE, ET AL.,* *Appellees*

On Appeal From the United States District Court for the Western District of Washington

JURISDICTIONAL STATEMENT

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CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE; D-C INTERNATIONAL, INC.; GARRETT FREIGHTLINES, INC.; NAVAJO FREIGHTLINES, INC.; PACIFIC INTERMOUNTAIN EXPRESS CO.; WESTERN GILLETTE, INC.; RISS & COMPANY, INC.; IML FREIGHT, INC.; and AMERICAN TRUCKING ASSOCIATIONS, INC.; YELLOW FREIGHT SERVICE; T.I.M.E. FREIGHT, INC.; TRANSCON LINES, INC.; CONSOLIDATED COPPERSTATE LINES; TRI-STATE MOTOR TRANSIT CO.; UNITED TRANSPORTS, INC.; BRASWELL MOTOR LINES, INC.; CENTRAL FREIGHT LINES, INC.; CENTRAL EXPRESS, INC.; RED ARROW FREIGHT LINES; BROWN EXPRESS, INC.; ALAMO EXPRESS, INC.; J. H. ROSE TRUCK LINE, INC.; J. J. WILLIS TRUCKING CO.; J. V. HARRISON TRUCK LINES, INC.; MILLER TRUCK LINE, INC.; H. S. ANDERSON TRUCKING CO.; CENTRAL FORWARDING, INC.; ROBERTSON TANK LINES, INC.; THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY; CHICAGO AND NORTH WESTERN RAILWAY COMPANY; CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY; CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY; CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY; THE COLORADO AND SOUTHERN RAILWAY COMPANY; THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY; ELGIN, JOLIET AND EASTERN RAILWAY COMPANY; FORT DODGE, DES MOINES AND SOUTHERN RAILWAY COMPANY; FORT WORTH AND DENVER RAILWAY COMPANY; GREAT NORTHERN RAILWAY COMPANY; GREEN BAY AND WESTERN RAILROAD COMPANY; GULF MOBILE AND OHIO RAILROAD COMPANY; ILLINOIS CENTRAL RAILROAD COMPANY; ILLINOIS TERMINAL RAILROAD COMPANY; THE KANSAS CITY SOUTHERN RAILWAY COMPANY; MISSOURI-KANSAS-TEXAS RAILROAD; MISSOURI PACIFIC RAILROAD COMPANY; NORFOLK AND WESTERN RAILWAY COMPANY; NORTHERN PACIFIC RAILWAY; ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY; SOO LINE RAILROAD COMPANY; THE TEXAS AND PACIFIC RAILWAY COMPANY; TOLEDO, PEORIA AND WESTERN RAILROAD COMPANY; UNION PACIFIC RAILROAD AND WATERLOO RAILROAD; and THE UNITED STATES OF AMERICA.

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On Appeal From the United States District Court for the Western District of Washington

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JURISDICTIONAL STATEMENT

Appellant American Farm Lines ("AFL") appeals from the judgment of the United States District Court for the Western District of Washington, entered March 26, 1969, nullifying certain orders of the Interstate Commerce Commission granting AFL temporary authority as a common carrier to haul general commodities for the United States Government between nine mid- and southwestern states and five western states. This Statement is submitted to show that this Court has jurisdiction over the appeal, and that the questions presented are substantial and deserving of plenary consideration.

OPINION BELOW

The opinion of the court below, issued on March 26, 1969, appears at Appendix A hereto.[1] The judgment of the court below from which this appeal is taken appears at Appendix B. The orders of the Interstate Commerce Commission that were the subject of the judicial review proceeding brought in the court below appear at Appendixes C and E.

JURISDICTION

This is an action brought by appellees under 28 U.S.C. §§ 1336 and 2321-25 to set aside orders of the Interstate Commerce Commission issued on September 3, 1968 and December 19, 1968. By these orders the Commission granted appellant AFL temporary authority to carry Government freight as a regulated motor common carrier. A hearing was held before a three-judge district court, and on March 26, 1969 that court entered its judgment setting aside the orders of the Commission. A notice of appeal was filed by AFL in the district court on May 23, 1969. The jurisdiction of this Court to review the final judgment of the district court on direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b). Cases sustaining this Court's jurisdiction on appeal from decisions of three-judge district courts reviewing orders of the Interstate Commerce Commission include *American Trucking Ass'ns, Inc.* v. *Atchison, T. & S.F.R. Co.*, 387 U.S. 397 (1967); *United States* v. *Drum*, 368 U.S. 370 (1962), and *American Trucking Ass'ns, Inc.* v. *United States*, 364 U.S. 1 (1960).

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[1] The lower court's opinion is reported at 298 F. Supp. 1006.

STATUTE INVOLVED

Section 210a(a) of the Interstate Commerce Act, 49 U.S.C. § 310a(a), provides in relevant part as follows:

> (a) To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier . . . by motor vehicle . . . .

QUESTIONS PRESENTED

The questions presented by this appeal are:

1. Whether the district court failed to apply the proper scope of judicial review in nullifying temporary authority orders of the Interstate Commerce Commission solely because the Defense Department statement supporting the application did not comply with supposedly "mandatory" procedural rules of the ICC, when the record as a whole contained evidence to support the Commission's order?

2. Whether the Interstate Commerce Commission had jurisdiction to reopen a temporary authority application proceeding, in order to receive additional evidence, at a time when petitions for reconsideration were pending before the Commission and when that proceeding was the subject of a judicial review action in a district court?

STATEMENT OF THE CASE

American Farm Lines ("AFL") is a federation of agricultural marketing cooperatives, and is itself an agricultural cooperative, formed in 1964 for the purpose of providing motor transportation services to its members. AFL's 16 member cooperatives engage in

the processing and marketing of the products grown by their own members.[2]

As a cooperative and federation of cooperatives AFL was not at the time of its formation, and is not now, required by law to possess a certificate of public convenience and necessity from the Interstate Commerce Commission in order to transport freight for its members. Section 203(b)(5) of the Interstate Commerce Act, 49 U.S.C. § 303(b)(5), prior to its amendment in 1968, exempted from the certification provisions of that Act

> motor vehicles controlled and operated by a cooperative association as defined in the Agricultural Marketing Act, approved June 15, 1929, as amended, or by a federation of such cooperative associations, if such federation possesses no greater powers or purposes than cooperative associations so defined . . . .[3]

This exemption was construed in 1965 to permit an agricultural cooperative engaged in motor transportation to carry freight for nonmembers to the extent that such nonmember transportation is "incidental and necessary" to the cooperative's primary transportation

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[2] The principal facilities of AFL's members are located in Washington, Oregon, Northern California, Utah, Nebraska, Missouri, Texas, New Mexico, Wisconsin, Maryland, Illinois and Massachusetts.

[3] Section 15(a) of the Agricultural Marketing Act of 1929, 12 U.S.C. § 1141j, defines the term "cooperative association" as follows:

> As used in this act, the term "cooperative association" means any association in which farmers act together in processing, preparing for market, handling, and/or marketing the farm products of persons so engaged, and also means any association in which farmers act together in purchasing, testing, grading, processing, distributing, and/or furnishing farm supplies and/or farm business services. *Provided, however,* That such associations are operated for the mutual benefit of

activities. *Northwest Agricultural Cooperative Ass'n* v. *Interstate Commerce Commission*, 350 F. 2d 252 (9th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966). AFL's nationwide service to its members has always necessitated that it perform sufficient nonmember transportation to insure that vehicles can be made available to members, when and as needed, and that members' products can be transported on an economically feasible basis. In December 1966, under the authority of its exemption, AFL began to haul freight for the Department of Defense to meet urgent defense needs.[4]

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the members thereof as such producers or purchasers and conform to one or both of the following requirements:

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein; and

Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

Third. That the association shall not deal in farm products, farm supplies, and farm business services with or for nonmembers in an amount greater in value than the total amount of such business transacted by it with or for members. All business transacted by any cooperative association for or on behalf of the United States or any agency or instrumentality thereof shall be disregarded in determining the volume of member and nonmember business transacted by such association.

[4] It was at this time that the Secretary of Defense adopted a policy of using farm cooperative transportation "because of our responsibility to obtain effective transportation of military supplies at the lowest overall cost to the Government and the taxpayer," and to encourage competition in the provision of transportation services to the Department. *Hearings on Agricultural Cooperative Transportation Exemption Before the Subcommittee on Surface Transportation of the Senate Committee on Commerce*, 90th Cong., 1st Sess. 155 (1967) (testimony of Defense Department witness). The Department's 1968 Directive requiring Defense agencies to select that means of transportation providing the lowest over-all cost is quoted at page 13, *infra*.

During 1967 AFL's ability to carry a sufficient level of nonmember freight to support its service to its members was threatened in two respects: First, legislation was introduced in Congress that would have substantially limited the scope of the exemption provided to cooperatives under section 203(b)(5);[5] and, second, a group of common carriers of munitions filed suit against AFL in the United States District Court for the Western District of Oklahoma under section 222(b)(2) of the Interstate Commerce Act, 49 U.S.C. § 322(b)(2),[6] seeking to impose severe limitations on AFL's ability to carry freight—particularly explosives—for the United States Government. *Munitions Carriers Conference, Inc.* v. *American Farm Lines,* Civ. No. 67-487, W.D. Okla. On February 20, 1968 an injunction was entered in this case prohibiting AFL from performing "back-to-back" movements—that is, two consecutive movements—for the United States Government.[7]

In July 1968 Congress enacted the legislation that had been introduced during 1967 to narrow the scope

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[5] S. 752, 90th Cong., 1st Sess. (1967). S. 752, as originally introduced, would have made the exemption available only when the nonmember transportation involved "farm products, farm supplies, or other farm-related traffic."

[6] Section 222(b)(2) authorizes suit by a private party alleging injury by reason of claimed violations of the Interstate Commerce Act or the regulations thereunder.

[7] On May 28, 1968 the same district court, in a companion case, *Munitions Carriers Conference, Inc.* v. *American Farm Lines,* Civ. No. 68-148, W.D. Okla., enjoined AFL from carrying nonmember freight except when proceeding to pick up or when returning from delivery of a member shipment, and then only when necessary to prevent proceeding with an empty vehicle. AFL's appeals in these cases are presently pending before the United States Court of Appeals for the Tenth Circuit.

of the agricultural cooperative exemption in section 203(b)(5) of the Interstate Commerce Act. Public Law 90-433, 82 Stat. 448. The amendment, which imposed for the first time a quantitative limit on nonmember transportation by cooperatives, provided that a cooperative could not, in any fiscal year, provide interstate transportation for hire to nonmembers in excess of 15 per cent of the cooperative's total interstate tonnage. In addition, for the first time, it defined "nonmember" service to include service to the United States Government.[8]

In order to preserve an ability to carry nonmember freight within the limits of the law, and particularly in order to continue to serve the Defense Department, AFL filed applications with the Interstate Commerce Commission in May and July, 1968, respectively, for temporary and permanent authority to carry freight for the United States Government as a regulated common carrier between nine mid- and southwestern states and five western states. These applications are both vigorously supported by the Defense Department.

Under section 210a of the Interstate Commerce Act, the ICC may grant temporary operating authority when there is shown to be an immediate and urgent need for the proposed service and there are no other carriers capable of meeting such need. Under ICC

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[8] Under section 15(a) of the Agricultural Marketing Act of 1929, 12 U.S.C. 1141j, which provided the definition of "cooperative" that had been adopted by reference in section 203(b)(5) of the Interstate Commerce Act, it was expressly provided that

> all business transacted by any cooperative association for or on behalf of the United States or any agency or instrumentality thereof shall be disregarded in determining the volume of member and nonmember business transacted by such association.

regulations a temporary authority application must be accompanied by a supporting statement from the shipper requiring the service. 49 C.F.R. 1131.2(c). In accord with these regulations, AFL's application was accompanied by a letter from the Department of Defense, dated May 15, 1968, urging that the application be granted. The Defense Department statement pointed out, in part, that recent court actions had resulted in severely restrictive interpretations of AFL's exception, and that AFL's ability to continue to provide necessary service to the Department was thereby substantially limited.

Protests to AFL's application were filed by some 125 motor and rail carriers, and on September 3, 1968 the ICC granted AFL's application for temporary authority. The order of the ICC granting the authority is reproduced in Appendix C. Petitions for reconsideration of the Commission's decision were filed by more than 20 of the protesting carriers, and on September 26, 1968, notwithstanding the fact that the pending petitions for reconsideration had not been acted upon, a number of the protesting carriers [9] filed suit in the court below, to set aside and annul the ICC's order of September 3, 1968. The complaint alleged that the supporting statement from the Department of Defense failed to comply with the ICC regulations prescribing the form and content of supporting shipper statements.[10] On October 2, 1968 the court entered an order

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[9] Eight of the ten original plaintiffs in this action had petitions for reconsideration pending before the ICC at the time they filed the complaint.

[10] The Commission's regulations, 49 C.F.R. § 1131.2(c) provide as follows with respect to such supporting statements:

(c) *Supporting statements.* Each application for temporary authority must be accompanied by a supporting statement(s)

designed to establish an immediate and urgent need for service which cannot be met by existing carriers, except that when the Department of Defense is the shipper such support may be furnished directly to the Temporary Authorities Board by the Washington office of that Department. Each such shipper's statement, except those submitted by the Department of Defense, must contain a certification of its accuracy and must be signed by the person (or an authorized representative thereof) having such immediate and urgent need for motor carrier service. Any such supporting statement must contain at least the following information:

(1) Description of the specific commodity or commodities to be transported (where the transportation of property is involved).

(2) Points or areas to, from, or between which such commodities or passengers are to be transported. (If service is needed to or from a territory or area rather than a specific point or points, clearly describe such territory or area and furnish evidence of a broad need to justify the territorial grant of authority requested.)

(3) Volume of traffic involved, frequency of movement, and how transported now and in the past.

(4) How soon the service must be provided and the reasons for such time limit.

(5) How long the need for such service likely will continue, and whether the persons supporting the temporary application will support a permanent service application.

(6) Recital of the consequences if service is not made available.

(7) The circumstances which created an immediate and urgent need for the requested service.

(8) Whether efforts have been made to obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts.

(9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal.

(10) Name and address of motor carrier who will provide service and is filing application for temporary authority.

(11) If the person supporting the application has supported any prior application for permanent or temporary authority covering all or any part of the desired service, give the carrier's name, address, and motor carrier docket number, if known, and state whether such application was granted or denied and the date of such action, if known.

staying *pendente lite* the effectiveness of the ICC order of September 3.

On October 16 and 18, 1968, the Defense Department and AFL responded to the petitions for reconsideration pending before the ICC. On November 5, 1968, the Commission, on its own motion, ordered the proceedings reopened to receive verified statements from both the applicant and the protestants.[11] (The Commission's order is reproduced at Appendix F hereto.) On November 20, 1968 the Defense Department filed the sworn statement of Mr. Vincent F. Caputo, its Director for Transportation and Warehousing Policy, the highest-ranking transportation official in the Department. (This statement is reproduced in Appendix D hereto.) The 22-page Defense Department statement pointed out that between August 1, 1967 and June 30, 1968 the Department had required transportation for more than 1.9 billion pounds of freight between the points AFL sought to serve as a common carrier (App. D, p. 21a), and that between December 1966 and June 30, 1968, AFL itself, under its exemption as a cooperative, had transported approximately 74 million pounds of freight for the Department. (App. D, p. 31a) The

[11] The Commission's order conferred substantial benefits on the protestants. It noted that numerous protestants had filed petitions for reconsideration of the order of September 3, 1968 and that the Defense Department's reply to these petitions had set forth additional reasons for granting the application, to which protestants had no opportunity to reply. Accordingly, the Commission directed that the Defense Department's verified statement "specify the commodities and points between which there is an immediate and urgent need for applicant's service which cannot be met by existing carriers." It then gave protestants a period in which to file responsive statements, after which the proceeding was to be "reconsidered by us on the record as made together with such verified statements as may be filed." (App. F, p. 41a)

statement also pointed out that the Department's need for delivery of freight "in the most expeditious manner possible" had not been filled by the existing common carriers, principally for three reasons:

> 1. Most existing service is available only on a "joint-line" basis, in many cases requiring participation by at least three carriers. In the Department's experience this requirement of interlining generally tripled transit times over those achieved with the direct, single-line service of AFL. (App. D, pp. 22a-23a)
>
> 2. Virtually all existing carriers authorized to provide service in the territories AFL proposed to serve are "regular route" carriers, who must follow prescribed highway routings set forth in their certificates. Thus, even where single-line service is available from an existing carrier between specific points, the carrier is required to operate over greater distances than would be required under an "irregular route" certificate such as that sought by AFL. (App. D., p. 23a.)
>
> 3. The pattern of operation of some existing single-line carriers was such that in transporting a given shipment delays were incurred at relay terminals for the switching of drivers and power units. AFL, by contrast, operates with two-man driver teams and without equipment changes, thus avoiding such delays. (App. D, p. 23a.)

The Defense statement commented that the Government was being forced to rely on a transportation system "largely comprised of carriers holding 'bits and

pieces' of authority"; [12] that expedited service was thus precluded; and that this inherently inefficient system has prevented establishment of the most economical distribution system possible. (App. D, p. 25a.) The statement set forth a great number of examples of expedited deliveries that had been effected by AFL in situations where no existing common carrier could provide comparable service. (App. D., pp. 31a-33a) It also set forth detailed examples of military origin and destination points in the territories covered by AFL's application between which there was no carrier authorized to perform single-line service for commodities shipped by the Department. (App. D., pp. 25a-27a)[13]

Finally, the Department indicated that the immediacy and urgency of its need for AFL's service as a certificated common carrier, requiring the issuance of temporary authority, was caused by the injunctions that had been entered against AFL, which had precluded AFL from rendering much of the service it had theretofore provided, and the recently enacted amendment to section 203(b)(5) of the Interstate Commerce Act, which threatened to "limit even more drastically" AFL's ability to serve the Department in

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[12] Following the Commission's decision in this case the Defense Department received over 100 requests from competing carriers to support them in similar efforts to obtain direct, point-to-point authority such as that granted AFL. It thus appears that AFL's action may have the effect of stimulating a substantial upgrading of the nation's motor transportation system.

[13] In an affidavit submitted in support of AFL's motion for a stay of the judgment below, the Defense Department also pointed out that AFL's direct, single-line transportation of hazardous commodities, such as explosives, involves shorter transit times and less handling of the freight, and thus reduces exposure to the dangers that are inherent in transporting such commodities.

the future. (App. D, p. 33a)[14] Significantly, the Defense Department statement was submitted only a short time after the promulgation of a major Defense directive on transportation policy, which requires all components of the Department to select that means of transportation "which will meet DOD requirements satisfactorily at the lowest overall cost from the origin to the final known destination". Dept. of Defense Directive No. 4500.9, par. IV(C)(1) (Sept. 27, 1968). This Directive emphasized the need for expedited service, such as that performed by AFL, by requiring that consideration be given to the extent to which expedited movement will contribute to economies through reductions in indirect costs. *Ibid.*

Statements in response to the Defense Department statement were filed by protestants in December, and on December 19, 1968 the Commission entered an order again granting AFL's application. The Commission's order, which is reproduced in Appendix E hereto, held that the record before the Commission established as follows with respect to the needs of the Department of Defense (App. E, p. 36a):

> (1) That, in discharging its responsibility for the conduct of the Nation's defense, it imperatively requires service over the most direct routes in a minimum transit time to effect movement of a vast quantity of numerous commodities between innumerable points and places within the United States and abroad;
>
> (2) That it has experienced inefficient and circuitous joint-line transportation by the use of existing carrier services which have been deficient

[14] The ICC hearing on AFL's permanent application began in June 1969, and is presently in recess until October 1969. Final disposition of that application is at least three years away.

for its needs, particularly relating to the coordination of the arrival of inbound shipments with the production schedules of manufacturing installations and the departure times and transhipment dates of matters and materials necessary to the national defense;

(3) That it has attempted but has been unable to obtain the required and necessary type of service and knows of no carrier in a position to meet its needs;

(4) That there is nothing in this record to establish that any of the protesting carriers provide a service to meet its needs;

(5) That unless applicant is granted the temporary authority sought herein, the Department of Defense will be without an expedited and flexible service for which it has an immediate and urgent need necessary to the defense of the country; and

(6) That, in balancing the scales of public interest, it is necessary to assure that the Government's immediate and urgent transportation requirement be met by an expedited and flexible service which will be used to complement rather than replace existing services.

A supplemental complaint was filed in the court below on December 31, 1968, alleging in substance that the new Defense Department statement still failed to comply with the Commission's regulations. An order staying the effectiveness of the Commission's order of December 19, 1968, was entered by the court below on January 6, 1969. The case was subsequently briefed and argued on the merits and on March 26, 1969 the lower court entered its judgment holding the ICC temporary authority orders of September 3 and December 19, 1968 null and void.

The court held that the Defense Department statement of May 15, 1968 did not comply with the ICC regulations because it failed to provide the two categories of information called for by subsections (8) and (9) of 49 C.F.R. 1131.2(c), namely:

> (8) Whether efforts have been made to obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts.
>
> (9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal.

In the court's view a response to subsections (8) and (9) was absolutely mandatory, and the ICC was without authority to waive any failure to respond. The court further held that notwithstanding the pendency of petitions for reconsideration before the ICC—which it found to be unauthorized under ICC rules [15]—the

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[15] The court below was clearly in error in holding that the petitions for reconsideration were unauthorized. AFL's application had originally been denied by the ICC's Temporary Authorities Board, a board of employees. AFL then filed a petition for reconsideration. Division 1 of the Commission, acting as an appellate division, thereupon reversed the Temporary Authorities Board. Rule 101(g) of the ICC's General Rules of Practice, 49 C.F.R. 1100.101(g), expressly provides for the filing of petitions for reconsideration of the Division action under these circumstances:

> (g) *Petitions for reconsideration of appellate division decisions on review of board decisions.* . . . If in the consideration of [a petition seeking reversal of a determination by a board of employees], by the appellate division, the previous determination of the board has been reversed, . . . *a further petition may be filed by any party to the proceeding adversely affected by the decision of the appellate* division . . . . [Emphasis added.]

ICC lost jurisdiction to reopen the record once the judicial review proceeding was filed. But even if the Commission had such jurisdiction, the court held, the new statement submitted on behalf of the Defense Department in November failed to provide the information called for by subsections (8) and (9). Accordingly, the court nullified both the September 3 and December 19 orders of the ICC.

THE QUESTIONS ARE SUBSTANTIAL

The practical effect of the judgment of the court below is not only to frustrate AFL's efforts to continue to provide lawful service to nonmembers by becoming a regulated common carrier, but is also to deprive the Department of Defense of a superior transportation service, immediately and urgently needed by it, the efficiency and economy of which are simply not available from other carriers.[16] Beyond these practical considerations, however, the judgment gives rise to substantial questions of administrative law, is in conflict with decisions in other districts, and, unless reversed, threatens wholly unwarranted interference with the Interstate Commerce Commission's administration of section 210a of the Interstate Commerce Act.[17]

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[16] In an affidavit submitted in the court below in support of AFL's motion for a stay of the judgment, the Defense Department pointed out that between December 1966 and March 1969 it had saved $1,062,300 in direct transportation costs by using AFL over the next lowest cost carrier. It also pointed out that the additional indirect savings in warehousing and inventory costs vastly overshadowed this figure (Affidavit of Vincent F. Caputo, Director of Transportation and Warehousing Policy, Department of Defense, p. 3).

[17] The extent of interference with the Commission's administration of section 210a can be judged from the following figures showing the constantly increasing number of actions by the ICC on temporary authority applications, as recently reported by the ICC

Under section 210a the ICC is granted broad discretion to grant an application for temporary authority, without hearing or other prescribed procedures, when two conditions are found by it to exist: (1) there must be an immediate and urgent need for the service, and (2) the territory within which the service is proposed must have no carrier service capable of meeting such need. The court below did not dispute the Commission's finding that the Department of Defense had an immediate and urgent need for the service proposed by AFL.[18] Nor did the court consider whether the record before the ICC, taken as a whole, contained evidence supporting the ICC's finding that there was no available carrier service capable of meeting this need. The court simply limited judicial review to a strict parsing of the Defense Department's supporting statement. It held that solely because that statement failed to indicate whether the Department had made

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to the Subcommittee on Surface Transportation of the Senate Commerce Committee:

Applications for Motor Carrier Temporary Authority Under Section 210a

Fiscal Year	Receipts	Dispositions
1964	4877	4901
1965	5415	5393
1966	5327	5370
1967	5706	5685
1968	6382	6399

ICC, *Report of Basic Policy Matters Under Consideration By the Interstate Commerce Commission*, app. D, Table 2 (1969).

[18] The court's decision was based solely upon a failure to comply with the supposedly "mandatory" requirements of subsections (8) and (9) of 49 C.F.R. § 1131.2(c). These subsections only call for information relating to the shipper's efforts to secure the desired service from other carriers, and not to the immediacy and urgency of the need.

efforts to obtain the service from other carriers, the Commission's grants of temporary authority must be set aside. It thus ignored the Department's statements that it knew of no other carriers able to provide the kind of service for which AFL was seeking authority, and in effect, required the Department to perform a useless act—to ask for service it knew could not be furnished.

On this appeal appellant will demonstrate that the Defense Department statement clearly provided the information called for by subsections (8) and (9). Even if it failed to comply literally with these sections, the statement reasonably showed that no other carrier was capable of performing the kind of service that AFL was performing for the United States Government. Moreover, had the court reviewed the ICC's decision on the basis of the *entire* record before the Commission, as it was required to do, it would have been clear from the evidence submitted by the protestants themselves that no other carriers were authorized to perform the service performed by AFL.

A. The Lower Court Failed To Apply the Proper Scope of Review

It is the well-established rule that a reviewing court must look to the entire record before the Commission to determine whether it acted arbitrarily in granting temporary authority under section 210a. *Bowen Transports, Inc.* v. *United States,* 116 F. Supp. 115, 120 (E.D. Ill. 1953) The Commission decision must be sustained if there is

> any evidence in the administrative record which tends to show that the temporary authority provides a service "for which there is an immediate

> and urgent need to a point or points or within a territory having no carrier service capable of meeting such need. . . ."

Roadway Express, Inc. v. *United States,* 263 F. Supp. 154, 157 (N.D. Ohio 1966). See also *Hussey* v. *United States,* 271 F. Supp. 650 (N.D. Cal. 1965); *Merchants Delivery Co.* v. *United States,* 265 F. Supp. 669 (W.D. Mo. 1967); *Union Cartage Co.* v. *United States,* 244 F. Supp. 1005 (D. Mass. 1965).

Moreover, the Commission itself is not limited to a consideration of the evidence submitted by the applicant. It may also take into account the statements filed with it by protesting carriers. If such statements themselves disclose that there are no other carriers capable of providing transportation comparable to that proposed in the application, the Commission's findings on this statutory criterion must be upheld. *Estes Express Lines* v. *United States,* 292 F. Supp. 842, 844 (E.D. Va. 1968), *aff'd per curiam,* 394 U.S. 718 (April 21, 1969).

In the instant case the Commission expressly found (App. E, p. 36a) not only that the Defense Department

> has attempted but has been unable to obtain the required and necessary type of service and knows of no carrier in a position to meet its needs;

but also that

> there is nothing in this record to establish that any of the protesting carriers provide a service to meet its needs.

In reviewing the Commission's action, however, the court below flatly refused to consider any portion of the record other than the Defense Department state-

ment. Its refusal was based upon its conclusion that the ICC regulations prescribing the content of such statements, 49 C.F.R. §§ 1131.2(c)(8) and (9), were "mandatory", that the Defense Department statement failed to comply with these requirements, and that action based upon such a defective statement was automatically invalid.

The court's exceedingly strict and technical reading of the ICC regulations failed to take account, however, of the purpose of these regulations.[19] These rules simply set forth a method of presenting facts to the Commission. They were adopted in 1965, in the face of an ever-increasing number of temporary authority applications, because the Commission found that many such applications failed to present the information necessary for the Commission to make its statutory findings. Under such circumstances the Commission found it difficult in some cases "to reach an informed and equitable decision." See *Acme Cartage Co.* v. *United States*, 290 F. Supp. 453, 456 n.4 (W.D. Wash. 1968) (quoting ICC policy statement). If a support-

[19] It is clear that such cases as *Service* v. *Dulles*, 354 U.S. 363 (1957), and *Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954), are completely inapposite here. Those cases prohibited governmental agencies from depriving individuals of substantial rights without observing procedural safeguards established by the agency for the adjudication of such rights. In each case the agency's failure to observe the safeguards substantially prejudiced the individual whom they were intended to protect. In the instant case the regulations simply prescribe the format of the evidence to be presented to the ICC, and are intended only to facilitate the ICC's consideration of temporary authority applications. They were plainly not intended to confer rights upon competing carriers. Moreover, the ICC's departure from these regulations could not conceivably prejudice competing carriers, who have ample opportunity to submit their own evidence, and to secure judicial review based upon the entire record.

ing statement reasonably presents facts upon which the Commission may act, despite the lack of a literal response to each category of required information, or if such facts appear in the record as a whole, a fair and equitable decision is clearly possible. The purpose of the regulation is thus served, and as long as the ICC's order is reviewable on the basis of the entire record made before the Commission, there is no danger of an improvident grant of authority and there can be no conceivable prejudice to any of the parties.

Significantly, other district courts presented with the argument that these regulations are "mandatory" have taken a contrary position to that adopted by the court below. The argument was flatly rejected, in *Roadway Express, Inc.* v. *United States,* 263 F. Supp. 154, 157 (N.D. Ohio 1966) ("rules reflect no intention to reduce or relinquish [ICC's] statutory discretionary power to issue certificates of temporary authority"), and again recently in *Superior Trucking Co.* v. *United States,* 1969 CCH Fed. Car. Cas. ¶ 82108, N.D. Ga., June 4, 1969, where the court stated (*Id.* at 54544)

> The regulations were designed to facilitate the Commission's findings of an urgent and unmet need; if facts supporting these findings exist in the record, the fact that the regulations were not strictly followed should be irrelevant. It is particularly inappropriate to strictly bind an agency to regulations made under a statute designed to encourage summary procedures. The Commission's regulations should not be read to impose more rigid standards on the grant of a temporary authority than the summary procedures envisioned by [section 210a of the Interstate Commerce Act].

The court in *Superior* noted that literal compliance with subsections (8) and (9) of 49 C.F.R. § 1131.2(c)

would impose substantial record-keeping burdens on shippers. It also pointed out that if the result of a failure to respond to these items was to "void a proceeding *ipso facto* [it] would be to effectively eliminate temporary authorities." *Id.* at 54544.

It is thus clear that by invalidating the ICC's orders solely on the basis of a failure to comply literally with supposedly "mandatory" rules, and in failing to determine whether the record as a whole contained evidence to support the Commission's orders, the court below departed radically from the settled rules of judicial review of such orders. It is also clear, and will be demonstrated in detail upon this appeal, that the record before the ICC contained more than ample evidence to support the Commission's orders.[20]

B. The Court Below Erroneously Held That the ICC Lacked Jurisdiction To Reopen the Administrative Record

In *Atchison, T. & S.F.R. Co.* v. *United States,* 231 F. Supp. 422 (N.D. Ill. 1964) the Commission's right to reopen its proceedings without leave of court, during the pendency of a judicial review action, was expressly upheld. The court held that the reopening was not in and of itself sufficient reason to void the Commission order. The court also pointed out—as is clearly the case here—that the plaintiffs had not been prejudiced by the reopening. A substantially similar result was reached in *Anchor Line Ltd.* v. *Federal Maritime Commission,* 299 F. 2d 124 (D.C. Cir. 1962).

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[20] The rule is clearly established that the "substantial evidence" test need not be met on review of such orders. *See Merchants Delivery Co.* v. *United States,* 265 F. Supp. 669 (W.D. Mo. 1967). As stated in *Roadway Express,* quoted at page 18, *supra,* the ICC must be upheld if there is *any* evidence in the record to support it.

Precisely the same situation was presented in the instant case. In preliminary proceedings in the court below it was argued that the original Defense Department statement was defective. Well prior to the presentation of the case on the merits to the lower court, and at a time when 8 of the original 10 plaintiffs themselves had petitions for reconsideration pending before the ICC, the Commission reopened the record to permit correction of the presumed omission. This was clearly an appropriate and efficient means of advancing final disposition of the case. Because the case had not been presented on the merits to the reviewing court, and was in fact still pending before the ICC by reason of plaintiffs' own petitions for reconsideration, the court was not inconvenienced or caused to expend judicial time needlessly. In addition plaintiffs could not conceivably have been prejudiced by the reopening. After reopening, all of the plaintiffs had ample opportunity to participate fully in the reopened proceeding, and in fact a number of them did submit sworn evidence.

Moreover, because the very nature of a temporary authority application—based as it is upon an immediate and urgent need—weighs heavily in favor of a prompt final disposition, there is ample justification for such reopening of the record. If there are defects that are easily correctable it clearly serves the purposes of section 210a to permit those defects to be remedied forthwith, without requiring fruitless completion of the review proceeding and commencement *de novo* of the administrative proceeding. *Cf. Evans* v. *Federal Communications Commission*, 113 F. 2d 166 (D.C. Cir. 1940). To prohibit reopening would be contrary to the statutory policy of promoting prompt disposition of agency's business, and would simply prolong the time

in which errors might otherwise be corrected. "The loser before the Commission has no vested right that the Commission's errors be preserved pending appeal." *Wrather-Alvarez Broadcasting, Inc.* v. *Federal Communications Commission*, 248 F. 2d 646, 648 (D.C. Cir. 1957).

Unlike some other regulatory statutes, the statutes relating to review of ICC orders do not purport to oust the administrative jurisdiction upon the filing of a petition for judicial review.[21] Thus, in the absence of a provision making the court's jurisdiction exclusive, and in view of the strong policy favoring prompt dispositions of temporary authority applications, it was error to hold that the ICC lacked jurisdiction to reopen the record in this case.

CONCLUSION

The statutes that vest jurisdiction to review ICC orders in the first instance in federal district courts create the potential for extreme variation in result among the districts. Such variations themselves create the potential for forum-shopping by disappointed parties before the agency, particularly in cases such as this, involving industry-wide opposition, where concerted efforts by trade associations can produce innumerable plaintiffs.[22] Because such decisions are re-

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[21] Compare, *e.g.*, § 19 of the Natural Gas Act, 15 U.S.C. § 717r (agency may modify or set aside orders until record is filed in Court of Appeals); § 10(d) of National Labor Relations Act, 29 U.S.C. § 160(d) (same).

[22] The instant case itself has strong overtones of forum shopping. Under 28 U.S.C. § 1398(a) suits to review ICC orders may be brought in the district in which any plaintiff has its principal office or residence. There were well over 100 protestants in the ICC proceeding, including the industry's leading trade association, the

viewable only in this Court, on direct appeal, the courts of appeals are not available to bring a pattern of uniformity to the decisions of the district courts. It is important to the proper administration of the Interstate Commerce Act, therefore, that this Court exercise its jurisdiction to preserve uniformity where a district court has departed significantly from established rules, and to resolve conflicts among districts just as it exercises jurisdiction to resolve conflicts among circuits in cases reviewable on certiorari. *See* Sup. Ct. R. 19 (1)(b). Appellant respectfully submits that this appeal presents just such a case.

The court below has now held in two cases—both the instant case and *Acme Cartage Co.* v. *United States,* 290 F. Supp. 453 (W.D. Wash. 1968)—that the ICC's rules prescribing the form and content of supporting shipper statements in temporary authority cases are "mandatory." In each case it has nullified considered decisions of the ICC on the highly technical and formalistic ground that these rules were not precisely complied with. In each case the court invalidated the agency action without considering whether the supposed deficiency caused prejudice to the plaintiffs and without determining whether the record as a whole contained evidence to support the ICC order.

The potentially disruptive effect that such decisions can have, if left uncorrected, is evidenced by the fact that these decisions of the lower court formed the basis for at least two subsequent attacks on ICC temporary

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American Trucking Associations, Inc. Thus, a judicial review action could have been brought almost anyplace in the United States. Yet the case found its way to the very court that decided *Acme Cartage, supra,* on exactly the same ground. Notably, the opinions in the instant case and *Acme* were written by the same judge.

authority orders. In both *Estes Express Lines* v. *United States*, 292 F. Supp. 842 (E.D. Va. 1968), *aff'd per curiam*, 394 U.S. 718 (April 21, 1969), and *Superior Trucking Co.* v. *United States*, 1969 Fed. Car. Cas. ¶ 82108 (N.D. Ga. 1969), the plaintiffs unsuccessfully sought to invalidate ICC orders on exactly the grounds relied on by the court below in this case and *Acme*.[23] It is clear, therefore, that to allow the rule of this case to stand is simply to invite disappointed protestants in temporary authority cases to challenge Commission orders under section 210a in court and to seek stays against such orders, thus frustrating the very purpose of section 210a to permit the ICC to make urgently needed and unavailable service possible on a summary basis.

For the foregoing reasons the Court should note probable jurisdiction of this appeal. Moreover, appellant respectfully suggests that it would be appropriate for three reasons for this Court, upon noting probable jurisdiction, to dispose of this appeal by a summary reversal of the court below. First, appellant believes that the Court's recent *per curiam* affirmance of the district court in the *Estes* case is controlling here. In *Estes* the appellants unsuccessfully attempted to have this Court rule that the ICC's temporary authority regulations are "mandatory," just as did the court below. Second, the decision of the court below is clearly erroneous, in that the court failed to consider whether the record as a whole contained evidence supporting the ICC decision, as it was required to do by established law. Third, summary dis-

[23] In *Estes* the plaintiffs expressly relied on *Acme Cartage*, and in *Superior* the plaintiffs expressly relied both upon *Acme Cartage* and the instant case.

position is particularly appropriate where time factors are of the essence, as they are in a case involving temporary motor carrier authority, and especially where that authority relates to the transportation of critical defense materials.

Respectfully submitted,

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